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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 226

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,

PETITIONER,

v.

CLIFFORD EUGENE DAVIS, JR., ET AL.,

RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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Baton Rouge, Louisiana:
WILLIAM P. SCHULER,
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SARGENT PITCHER, JR.,
District Attorney,
19th Judicial District;
JOHN F. WARD, JR.,
Assistant District Attorney,
19th Judicial District.

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EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
PETITIONER,

v.

CLIFFORD EUGENE DAVIS, JR., ET AL.,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioner, the East Baton Rouge Parish School Board, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on February 9, 1961.

CITATIONS TO OPINIONS BELOW

The order and judgment of the United States District Court for the Eastern District of Louisiana, Honorable J. Skelly Wright presiding, rendered and entered on the 28th day of April and 25th day of May, 1960, are unreported but are printed in Appendix "B"

hereto. The opinion and decrees of the United States Court of Appeals for the Fifth Circuit rendered and entered on February 9, 1961, are reported in 287 Fed. (2d) 376, and are printed in Appendix "B" hereto. The order of the United States Court of Appeals for the Fifth Circuit denying a rehearing was rendered on April 13, 1961 and is printed in Appendix "B" hereof.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on February 9, 1961. (Tr. pp. 183-188.) Rehearing was denied on April 13, 1961. (Tr. p. 189.) The jurisdiction of this Court is invoked pursuant to 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

A.

May the United States District Court entertain an unconsented action against a State agency, by citizens of the State, or is such a suit prohibited by the Eleventh Amendment to the United States Constitution?

B.

Should the Court issue a Summary Judgment based on conditions alleged to exist four years prior to the rendition of the Summary Judgment without any proof that such conditions still existed at the time of rendition of the Summary Judgment and without giving the opposing party an opportunity, by a trial

on the merits, to present evidence that such conditions did not in fact exist.

STATUTE INVOLVED

The Constitution of the State of Louisiana, Article XIX, Section 26, withdrawing consent to suit against the Parish School Board.

STATEMENT OF FACTS

Clifford Eugene Davis, Jr. and numerous other complainants filed a complaint of February 29, 1956, against the East Baton Rouge Board and Lloyd Funchess, Superintendent. (Tr. pp. 2-19.) The complainants filed as relatives and/or next of kin of numerous minors named in the complaint.

Jurisdiction in the United States District Court for the Eastern District of Louisiana was invoked pursuant to:

(1) U. S. C. 28:1331 and U. S. C. 8:41 and 43;
(2) U. S. C. 28:1343; U. S. C. 8:41 and 43 and the Fourteenth Amendment to the Constitution of the United States.

Injunctive relief, both temporary and permanent, was sought under 28 U. S. C. 2281 to restrain and enjoin the enforcement, execution and operation of certain alleged unconstitutional statutes and constitutional provisions of the State of Louisiana, "By restraining the action of the defendants, officers of such State in the enforcement and execution of such constitution and statutes as herein more fully appears."

Also sought was a declaratory judgment and injunction under 28 U. S. C. 2201 and 2202 for the purpose of determining questions in actual controversy between the parties.

Complainants prayed for the convening of a three-judge court to:

(1) Adjudge, decree and declare the rights and relations of the parties and enter Judgment therein;

(2) Enter a judgment or decree declaring the policy, customs, practices and usages of the defendants in denying the infant plaintiffs and other negro children equal facilities of education afforded white children unconstitutional;

(3) Declaring the rules and regulations of defendants prohibiting negro children to enter public schools with white pupils unconstitutional;

(4) Declaring Article XII, Section 1, of the Louisiana Constitution unconstitutional;

(5) That a permanent injunction issue restraining defendants from denying to negro pupils educational facilities equal to white pupils;

(6) Issue a permanent injunction restraining defendants from making any distinction based on race or color in the opportunities, ad-

vantages, and facilities provided by defendants.

On March 2, 1956, the request by defendants for the convening of a three judge court was denied. (Tr. pp. 22) Various depositions were taken by both plaintiffs and defendants (Tr. pp. 23-140) and the case was submitted thereon.

On March 4, 1959, plaintiffs filed a motion for Summary Judgment and on March 8, 1960, a petition of intervention was filed. (Tr. pp. 141-159)

After opposition to the motion for Summary Judgment had been filed, the Court, on April 28, 1960, granted the motion for Summary Judgment. (Tr. pp. 170-171)

On May 25, 1960, judgment was rendered in favor of plaintiff and on May 26, 1960, a Notice of Appeal was filed. (Tr. pp. 171-173) This matter was heard before the Fifth Circuit Court of Appeals on February 9, 1961. The decision of the District Court was affirmed and a re-hearing denied on April 13, 1961. (Tr. pp. 215)

REASONS FOR GRANTING WRIT

A.

The salient question directed to the Court here is the application of the Eleventh Amendment. In this case the decisions of the courts below, if allowed to remain unaltered, or if adopted by this Court, would nullify the Eleventh Amendment to the United States Constitution. The result would violate both the

spirit and letter of the amendment, as well as conflict with decisions of this Court and courts of appeal of other circuits.

In the matter at bar the petitioner is a State agency, created by State Constitution to perform certain functions, and may not be sued without consent of the Legislature first being obtained. *Louisiana Constitution*, Article 19, Section 26.

The courts below seemed to feel that a suit against a State agency cannot be considered a suit against the State. This conflicts with the preponderance of case law.

There is very little doubt that the jurisprudence of the United States as a whole and of the Federal Courts particularly is so overwhelming that a governmental agency, unless created with the power to be sued and to sue, cannot be made a party to a suit without the specific permission of its creator.

In 1952 in the District of Columbia a situation somewhat similar to this one arose, and the Court therein realizing that the law was so well settled did not find it necessary to cite authorities since the law was so clear, and only stated:

> "At the outset it should be stated that the Board of Education and the Board of Commissioners, as such, are not entities and that therefore are not subject to suit and a motion should be granted as to them on the ground without further consideration." *Miller, et al., v. Board of Education, Dis-*

trict of Columbia, et al., 106 Fed. Supp. 988, 989 (D. C., D. C., 1952).

See also:

Parker v. Board of Education of Sumter County, 70 S. E. (2d) 369 (Georgia);
Smith v. Hefner, 68 S. E. (2d) 783 (N. C.);
Stepan v. Louisiana State Board of Education, 78 So. (2d) 18, 21.

The decision in this case stems directly from a decision of the Fourth Circuit in the case of *Charlottesville v. Allen*, 240 Fed. (2d) 59 (1956). In that case for the first time, without support in jurisprudence, law or statute, a Court first enunciated the doctrine that a State agency could be sued without the consent of the State. This concept born in 1956 in the Fourth Circuit has been nurtured in the Fifth Circuit, oddly enough, only in cases involving "segregation."

When such a radical concept suddenly comes into being, it is only natural that one should go back and examine the keen analysis and irreputable logic which went into the writing of the opinion.

This earth-shaking departure from years of jurisprudence is contained all in one paragraph of the opinion located on page 63 thereof, which reads as follows:

> "It is argued that the *doctrine thus laid down must be confined to individuals and may not be applied to corporate agencies of state, such as school boards. We see no grounds for such dis-*

tinction. If high officials of the state and of the Federal Government (see Philadelphia Company v. Stimson, supra) may be restrained and enjoined from unconstitutional action, we see no reason why a school board should be exempt from such a suit merely because it has been given corporate powers. A state can act only through its agents; and whether the agent be an individual officer or corporate agency, it ceases to represent the state when it attempts to use state power in violation of the Constitution and may be enjoined from such unconstitutional action. While no such question was raised in the cases heard by the Supreme Court in Brown v. Board of Education, 347 U.S. 483, 74 Sup. Ct. 686, 98 Law Ed. 873 and 349 U.S. 294, 75 Sup. Ct. 753, 99 Law Ed. 1083, the question was inherent in the record in those cases; and it is not unreasonable to suppose that the Supreme Court would have directed injunctive relief against school boards acting as state agencies, if no such relief could be granted because of the provisions of the Eleventh Amendment of the Constitution." (Emphasis supplied.)

The first premise, that the Court saw no ground for distinction between a corporate agency of the State and the individual, was in direct contradiction with all the jurisprudence decided on the matter up until that date.

Aerated Products Co. of Philadelphia, Pa., v. Department of Health of New Jersey, et al., 159 F. (2d) 851 (C. A. 3, 1947):

"The Eleventh Amendment of the Federal Con-

stitution denied to Federal Courts the jurisdiction over suits against a State by citizens of another State. The Department is a part of the executive branch of the New Jersey government. Revised Statutes of New Jersey government. Revised Statutes of New Jersey of 1937, 26:2-2-1, et seq., N. J. S. A.; Board of Health v. Mundet Cork Corporation, 1939, 126 N. J. Eq. 100, 8 A. (2d) 105, affirmed 1940, 107 N. J. Eq. 61, 11 A. (2d) 260. *Consequently, we agree with the court below that plaintiff's suit against the Department is prohibited by the Eleventh Amendment.* Ford Co. v. Department of Treasury, 1945, 323 U. S. 459, 65 S. Ct. 347, 89 L. Ed. 389.

"As to Mahaffey, the rule is equally clear that *his function as a public official brings him within the protection of the Eleventh Amendment only if the statutes authorizing his actions are constitutional, and if his actions do not exceed the authority granted him.* Baldwin v. G. A. F. Seelig, 1935, 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032, 101 A. L. R. 55. If the activities of Mahaffey are in violation of a right guaranteed by the federal Constitution, this court has jurisdiction to enjoin such." (Emphasis supplied.)

United States Department of Agriculture, et al., v. Hunder, et al., 171 F. (2d) 793 (C. A. 5, 1949):

"While cases may be found in which a department or bureau of the government has been suffered to assert rights, the Department of Agriculture is not truly a juridical person being neither an individual nor a corporation. *It is an agency of the Government, not empowered to sue, or to be sued in evasion of sovereign immun-*

ity. See United States Dept. of Agriculture v. Remund, 330 U.S. 539, 541, 67 S. Ct. 891, 91 L. Ed. 1082. The Secretary, however, is a person. If he by affirmative act exceeds his lawful authority or threatens to do so, to the injury of established rights, he may be enjoined, for in such circumstances he is not truly representing the Government." (Emphasis supplied.)

New Haven Public Schools v. General Services Administration, 214 F. (2d) 592 (C. A. 7, 1954):

"It is admitted that the two defendants dismissed by the District Court are agencies of the executive branch of the United States Government. In other words, they are administrative departments of the Government. *It has long been established that such agencies are not truly juridical persons but are strictly representatives of the government, who may not be sued in evasion of sovereign immunity.* United States Dept. of Agriculture v. Remund, 330 U.S. 539, 541, 67 S. Ct. 891, 91 L. Ed. 1082; Herrin v. Farm Security Administration, 8 Cir., 153 F. (2d) 76; Thomason v. Works Progress Administration, 8 Cir., 153 F. (2d) 342; North Dakota-Montana Wheat Growers' Assn. v. United States, 8 Cir., 66 F. (2d) 573, 92 A. L. R. 1484, certiorari denied 291 U. S. 672, 54 S. Ct. 457, 78 L. Ed. 1061.

"*Plaintiff seeks to escape the effect of this rule for the reason, as it argues, that the suit is controlled by decisions in actions rightfully brought against individual governmental officers.* It is fatal, we think, to this contention that no officers were named as parties or served with process. Indeed, such officers are subject to suit only in

> the District of Columbia. Blackmar v. Guerre, 342 U. S. 512, 72 S. Ct. 410, 96 L. Ed. 534, The District Court properly held that it did not have and could not entertain jurisdiction over the agencies." (Emphasis supplied.)

Evidently, the Fourth Circuit believed that the Department of Health of New Jersey could be sued directly despite the language used by the Third Circuit; that the United States Department of Agriculture could be sued despite the language of the Fifth Circuit, and that the General Services Administration could be sued despite the language used by the Seventh Circuit. But even above and beyond this, it is difficult to see how the Fourth Circuit ignored and avoided the doctrine of nonsuability of an agency of government enunciated by this Court in the case of *Blackmar v. Guerre*, 342 U. S. 512, 72 U. S. Supreme Court 410 (1952):

> "*Since the Civil Service Commission is not a corporate entity which Congress has authorized to be sued, a suit involving the action of the Commission generally must be brought against the individual Commissioners as members of the United States Civil Service Commission.* No such suit was brought here, and no service was had upon the individuals comprising the Civil Service Commission. Therefore, neither the individuals comprising the Civil Service Commission nor the Commission as a suable entity was before the District Court." (Emphasis supplied.)

Again it would appear that the Court ignored the permissible limits recently established by this Court

when it stated unequivocally that it would only allow a suit against an individual in order to enjoin unconstitutional action.

> "Passing to the jurisdictional ground upon which District Court rested its decision, we note that the State of Georgia was not named as a party in the District Court. But since the appellee is a state officer, the Court below probably considered whether the relief sought against the officer is not, in substance, sought against the sovereign. If this action is in effect, an unconsented suit against the State, the action is barred.
>
> "The District Court characterize appellant's action as one to enforce an alleged contract with the State of Georgia, and, as such, suit against the State but appellant's complaint is not framed as a suit for specific performance. It seeks to enjoin appellee from collecting taxes in violation of appellant's right under the Federal Constitution. *This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the state.* These decisions were re-examined and re-affirmed in ex parte Young, 1908, 209 U. S. 123, 28 Sup. Ct. 441, 52 Law Ed. 714, and have been consistently followed to the present date. This general rule *has been applied in suits against individuals* threatening to enforce allegedly unconstitutional taxation, including cases where, as here, is alleged that the taxation would impair the obligation of contracts. Georgia Railroad and Banking Company v. Redwine, 72 Sup. Ct. 321, 324, 342 U. S. 229." (Emphasis ours.)

It is earnestly and hopefully urged that this doc-

trine annunciated by the Supreme Court in these cases will incur the same universal application as does the *Brown* decision.

The next premise upon which the Court based its decision is equally as untenable as the prior one. It stated that since the jurisdictional question was not raised in the *Brown* case, it was inherent in the record and it would not be reasonable to suppose the Supreme Court would have allowed the injunctive relief against the state agency if the relief could not be granted. It seems to be rather weak to say that there definitely is jurisdiction in a case since the Supreme Court failed to note that there was no jurisdiction, and this is even more so true, since, if the record were carefully read, it would be noted that in the *Brown* case the Kansas statutes had specifically given to the School Board the power to sue and be sued, and, for that reason, the question of jurisdiction, and/or suit against the state was never raised and hence never decided.

While petitioners herein are certain that the suit was in contravention of the Eleventh Amendment, as being a suit against the State, subsequent proceedings eliminated any possibility of doubt. On the ..... day of March, 1956, the United States District Court, in a proceeding to enforce its order, made the State of Louisiana a party to this matter. The order reads as follows:

"IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF LOUISIANA

BATON ROUGE DIVISION

Civil Action

No. 1662

CLIFFORD EUGENE DAVIS, ET AL.,

Plaintiffs,

v.

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,

Defendants.

ORDER ADDING PARTIES DEFENDANTS

IT APPEARING from the motion of the United States *amicus curiae* herein, that it is in the interest of justice to add as parties defendant in this action the STATE OF LOUISIANA; JIMMIE H. DAVIS, Governor of Louisiana, JACK P. F. GREMILLION, Attorney General of Louisiana; MURPHY J. RODEN, Director of Public Safety of Louisiana; SARGENT PITCHER, JR., District Attorney of East Baton Rouge Parish; BRYAN CLEMMONS, Sheriff of East Baton Rouge Parish; JOHN CHRISTIAN, Mayor of the City of Baton Rouge; and SHIRLEY S. ARRIGHI, Chief of Police of the City of Baton Rouge,

IT IS ORDERED that each of them be and they are hereby added as parties defendant in this action, and the marshal is directed to serve upon each of them a copy of this order together with a copy of the motion and petition of the United States.

New Orleans, Louisiana, March 17th 1961.

/s/ J. SKELLY WRIGHT

UNITED STATES DISTRICT JUDGE

CLERK'S OFFICE:

A TRUE COPY

March 20, 1961

REBA SCOTT
Deputy Clerk, United States District Court
Eastern District of Louisiana
New Orleans, La."

Petitioners cannot conceive of a bolder or more unrestrained violation of the Eleventh Amendment than the one occurring herein. If this rule of jurisprudence is allowed to stand the Eleventh Amendment will in effect be read out of the Constitution. It will be simple for any person to file suit against the State Officer, alleging the unconstitutionality of a State Statute, and after judgment is obtained, making the State a party to the enforcement of any judgment obtained.

B.

The original complaint in this proceeding was filed on February 29, 1956. At that time there were various existing statutes of the State of Louisiana which required the East Baton Rouge Parish School Board and its Superintendent to operate the schools of East Baton Rouge Parish on a racially segregated basis. The order granting the motion for summary judgment was not issued until April 28, 1960, and

the judgment thereunder was not rendered until May 25, 1960, more than four years after the original complaint was filed.

The testimony of the Superintendent of East Baton Rouge Parish Schools, Dr. Lloyd B. Funchess, which this Honorable Court quoted in its decision, was taken by deposition on April 24, 1956. Approximately four years had passed between the time of taking the depositions of Dr. Funchess and the time of rendition of the summary judgment. There have been many changes in the operation of schools in the Parish of East Baton Rouge during that time. All laws of the State of Louisiana which required racial segregation in the public schools and which existed at that time, or which have been adopted since that time, have been declared unconstitutional by the Courts in the many decisions rendered in the case of *Orleans Parish School Board v. Bush*, 268 F. (2d) 78. At the time the summary judgment was issued, and at this time, there is no law of the State of Louisiana which requires segregation of the races in the public schools of East Baton Rouge Parish.

The testimony of Dr. Funchess, which is practically the only evidence in the record which would tend to prove that the East Baton Rouge Parish School Board is operating the public schools within the Parish of East Baton Rouge on a racially segregated basis, and which testimony was relied on most heavily by both the Federal District Court and this Honorable Court, in substance, shows that as of April 24, 1956,

the East Baton Rouge Parish School Board was operating its school system on a racially segregated basis because of the State law which required it to do so. On page 49 of the Transcript of Record of this proceeding Dr. Funchess' testimony is as follows, and we quote:

> "Q. Now, what official action did your Board take with respect to this particular petition, Dr. Funchess?
>
> A. This particular petition was acted upon by the Board at the meeting of November 10, 1955, and the minutes indicate that Mr. Sheppard resolved that the above mentioned petition be filed in accordance with the Board's resolution of August 25, 1955, which reads as follows: '*Resolved, that as far as segregation is concerned, the Board will follow the State law on the subject.*" (Emphasis supplied.)

The testimony of Dr. Funchess is to the effect that the East Baton Rouge Parish School Board, as a matter of policy, *and in accordance with, and because of, existing state laws*, required him, Dr. Funchess, as Superintendent of schools, to assign pupils to the schools in East Baton Rouge Parish on a racially segregated basis. This was the situation on April 24, 1956. It is not the situation today, and it was not the situation at the time the summary judgment was granted.

At the time the summary judgment was granted there was no evidence in the record that the East Baton Rouge Parish School Board, or Dr. Funchess as Superintendent, were operating the East Baton Rouge Parish

Schools system on a racially segregated basis. We respectfully submit, that not only have the plaintiffs failed to prove that there is no dispute as to facts, which would justify a summary judgment being rendered, they have not even proved that at the present time the East Baton Rouge Parish School Board or its Superintendent is, in fact, operating its schools on a racially segregated basis, or has not began a "reasonable start toward compliance" as required in the *Cooper* case cited below. Certainly, if, as a matter of fact, the East Baton Rouge Parish School Board and its Superintendent are not operating the East Baton Rouge Parish Schools on a racially segregated basis, there is no need, nor justification, for an injunction to issue prohibiting them from doing so.

Certainly, there are many valid and legitimate criteria which can be considered in assigning students to particular schools. Such items as classroom availability, temperament, educational background, geographic location to the schools, etc., are all valid factors that may be considered in the assignment of pupils to particular schools. This is clearly recognized in the case of *Cooper v. Aaron* (1958), 358 U. S. 1, 78 S. Ct. 1401, wherein the Court said:

> "Under such circumstances the District Courts were directed to require 'a prompt and reasonable start toward full compliance' . . . on the other hand, a District Court, after analysis of the relevant factors (which of course, excludes hostility to racial desegregation) might conclude that justification existed for not requiring the present non-

segregated admission of all qualified Negro children."

There is no evidence in the record which would tend to prove that the East Baton Rouge Parish School Board and its Superintendent have not made "a prompt and reasonable start toward full compliance" at the time the summary judgment was issued. To issue such a summary judgment, and injunction, at this time, is to predetermine, without evidence, the question of fact of whether or not the East Baton Rouge Parish School Board, and its Superintendent, have made such reasonable start toward compliance. We respectfully submit that such a determination should only be made after a trial on the merits in which that question, as a matter of fact, has been determined.

The proceeding on a motion for summary judgment is not a trial, but is for determination of the question of whether there is a genuine issue to be tried. *Crosby v. Oliver Corporation*, D. C. Ohio, 1949, 9 F. R. D. 110; *Norton v. Shotmeyer*, D. C. N. J., 1947, 72 F. Supp. 188; *Florida Dehydration Co. v. U. S. Ct. Cl.*, 1951, 101 F. Supp. 361, certiorari denied 72 S. Ct. 759, 343 U. S. 926, 96 L. Ed. 1337. Such a motion should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. *Stephens v. Howard B. Johnson Co.*, C. A. 4th, 1950, 181 F. (2d) 390. We respectfully submit that at the time the motion for summary judgment was filed and at the time the summary judgment was rendered, there not only were issues of fact to be tried, but there was not one

shred of evidence before the Court which would indicate that the East Baton Rouge Parish School Board and its Superintendent had not, at that time, began and steps toward desegregation.

The burden of proof is normally, and should be, on the plaintiff to prove; not on the defendant to disprove. And, even if the defendant is to be required to disprove, he should be given an opportunity to do so in a trial on the merits as in any other normal court proceeding. At the very least, the defendant School Board and Superintendent should have an opportunity to present evidence that they were not, at the time of the granting of the summary judgment, operating the schools of East Baton Rouge Parish on a racially segregated basis, or, that they had begun a "reasonable start toward full compliance." There was no evidence in the record at that time which tends to either prove or disprove this disputed fact.

CONCLUSION

For the reason stated above, petitioner herein feels that it is incumbent upon this Court to preserve, fully and completely, the postive prohibition contained in the Eleventh Amendment by reversing the decision of Courts below.

For the foregoing reasons, we respectfully submit that the judgment below granting the motion for summary judgment should be reversed and remanded with directions to take further evidence on the disputed questions of fact, that is, wnether or not the East Baton Rouge Parish School Board is now operating its schools

in a racially segregated manner and whether or not said Board had, at the time of granting the summary judgment, and presently, made a reasonable start toward compliance with the decisions of the United States Supreme Court in the cases of *Brown v. Board of Education*, 347 U. S. 483, and *Cooper v. Aaron*, 358 U. S. 1, 3 L. Ed. (2d) 5.

JACK P. F. GREMILLION,
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Assistant Attorney General;
SARGENT PITCHER, JR.,
District Attorney,
19th Judicial District;
JOHN F. WARD, JR.,
Assistant District Attorney,
19th Judicial District.

PROOF OF SERVICE

I, John F. Ward, Jr., one of the attorneys for petitioner, certify that on this day I served copies of the foregoing Petition for Writ of Certiorari on A. P. Tureaud, Esquire, Council for Respondent, by mailing a copy thereof, postage prepaid, addressed to his office, 1821 Orleans Avenue, New Orleans, Louisiana; on Wade H. Heaton, attorney for Intervenor, at his office in the Fidelity National Bank Building, Baton Rouge, Louisiana; and on the Solicitor General of the United States, at his office in the Justice Department, Washington, D.C.

Dated this 10th day of July, 1961.

John F Ward Jr

JOHN F. WARD, JR.
Assistant District Attorney
19th Judicial District
State of Louisiana

Sworn to and subscribed before me, the undersigned Notary Public, within and for the Parish of East Baton Rouge, State of Louisiana, this 10th day of July, 1961.

Ralph L Ray

NOTARY PUBLIC

APPENDIX "A"

CONSTITUTION, STATE OF LOUISIANA, 1921 ARTICLE XIX, SECTION 26.

Section 26. The following named commissions, boards, bodies or municipal corporations are and shall be considered special agencies of the State of Louisiana:

(1) The State Parks Commission of Louisiana,

(2) The Recreation and Park Commission for the whole Parish of East Baton Rouge,

(3) All recreation districts created under terms of Article XIV, Section 14 (d-4) of this Constitution;

(4) Any municipal corporation, parish or subdivision of the State in matters respecting the operation or maintenance of parks and other recreational facilities or in connection with any rule or regulation applicable thereto,

(5) The State Board of Education,

(6) The Board of Supervisors of Louisiana State University & Agricultural & Mechanical College,

(8) The school boards of the municipalities of Monroe in Ouachita Parish and Lake Charles in Calcasieu Parish, and Bogalusa in Washington Parish,

(9) The State Superintendent of Public Education in his capacity as such as well as in the capacity of ex-officio secretary of the State Board of Education, and

(10) The State Department of Education.

The consent of the State of Louisiana to suits or legal proceedings against any of the above listed special agencies, (however heretofore given) is hereby expressly withdrawn and no such suit or proceeding shall be permitted except as provided in this section. This withdrawal of consent to suits and legal proceedings shall apply not only to suits and legal proceedings filed in the future but also to any pending suits or legal procedure. There is expressly excepted from the foregoing, suits for the enforcement of contracts entered into by any of the special agencies or for the recovery of damages for the breach thereof. Additionally, the Legislature of Louisiana may, in individual cases, by appropriate act grant to any party showing just and reasonable cause the right to sue any of these special agencies, in compliance with Section 35 of Article III of this Constitution.

This Section shall be self-operative and shall supersede any other portion of this Constitution or any statutes or regulations in conflict herewith. (Act 613 of 1956, adopted November 6, 1956).

APPENDIX "B"

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Minute Entry 4/28/60 Wright, J.

(Number and Title Omitted)

This cause came on at a former day, to be heard on the motion of plaintiffs for summary judgment; on motion of defendants for an Order to join the National Association for the Advancement of Colored People, Louisiana branch, as an indispensable party to this action; on the motion of defendants for more definite statement, and on motions of defendants to dismiss this action, and on the petition of Robert O. McCraine, Sr., et al, to intervene as defendants herein; and was argued by counsel for the respective parties and submitted, when the Court took time to consider.

Now, after due consideration thereof;

IT IS ORDERED by the Court that the motion of plaintiffs, for summary judgment herein, be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED by the Court that the motion of defendants, for an Order to join the National Association for the Advancement of Colored People, Louisiana branch, as an indispensable party to this action, be and the same is hereby, DENIED.

IT IS FURTHER ORDERED by the Court that the motion of defendants, for more definite statement, be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED by the Court that

the motions of defendants, to dismiss this action, be, and the same are hereby, DENIED.

IT IS FURTHER ORDERED by the Court that the petition of Robert O. McCraine, Sr., et al, to intervene as defendants herein, be, and the same is hereby DENIED.

(Signed) J.S.W.

JUDGMENT

(Number and Title Omitted)

Entered: May 25, 1960

This cause having come on for hearing on the 29th day of April, 1960, on plaintiffs' motion for summary judgment, and the court being of the opinion that the motion for summary judgment should be granted,

IT IS ORDERED, ADJUDGED AND DECREED that the defendant East Baton Rouge Parish School Board, its agents, its servants, its employees and successors in office, and those acting in concert with them, be, and they are hereby, restrained and enjoined from requiring segregation of races in any school under their supervision, and from engaging in any and all action which limits or affects the admission to, attendance in, or education of plaintiffs or any other negro child similarly situated in schools under defendants' jurisdiction, on the basis of race and color, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis

with all deliberate speed, as required by the decision of the Supreme Court in *Brown v. Board of Education of Topeka*, 349 U.S. 294.

This court retains jurisdiction of this cause for the purpose of entering such further orders or granting such further relief as may be necessary to bring about compliance with this decree.

(Signed) J. SKELLY WRIGHT
UNITED STATES
DISTRICT JUDGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18524

EAST BATON ROUGE PARISH SCHOOL BOARD AND LLOYD FUNCHESS, SUPERINTENDENT OF SAID SCHOOL BOARD,

Appellant,

versus

CLIFFORD EUGENE DAVIS, JR., A MINOR BY HIS FATHER AND NEXT FRIEND, CLIFFORD EUGENE DAVIS, SR., ET AL,

Appellees.

ROBERT O. McCRAINE, JR., ET AL,

Appellants,

versus

CLIFFORD EUGENE DAVIS, JR., A MINOR BY HIS FATHER AND NEXT FRIEND, CLIFFORD EUGENE DAVIS, SR., ET AL,

Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana.

(February 9, 1961.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and MIZE, District Judge.

TUTTLE, Chief Judge: Most of the questions raised by this appeal have been disposed of adversely to the appellants in the companion case of *St. Helena Parish School Board, et al, v. Hull, et al*, decided this day, 5 Cir., ... F. 2d ..... The contentions, (1) that this action is a suit against the State, and (2) that it fails to state a cause of action because the State of Louisiana has adopted a pupil placement law, are fully dealt with there, as they have been previously. There is no profit in belaboring them further.

The same may be said as to the appeal of the intervenor whose petition to intervene as the parent of white children was denied by the trial court.

Here, too, the appellants contend that the posture of the case was such that the motion for summary judgment, which was granted at the same time as that in the St. Helena case, was not appropriate because there were fact issues that required a full trial. Not only is this contention answered by the undisputed fact that the defendant was continuing to operate the schools of its parish in accordance with the state laws then on the statute books, which required racially segregated schools, but here there was the following testimony of the parish school superintendent:

"Q. . . . . You are in a general way familiar with the fact that the Supreme Court of the United States did issue a decree which said substantially that racial segregation in public education in the United States in unlawful —you are generally familiar with that?

A. That is correct.

Q. Has your Board made any effort to comply with that decree?

A. I would think not.

Q. Thank you, sir. When you make these assignments of children as they come to you, do you have in mind any consideration of their race and color?

A. We do.

Q. And do you assign them on a basis of race?

A. Accordingly. Yes.

Q. Do you have in consideration any thought of their religion?

A. No, sir.

Q. You don't assign them on the basis of religion?

A. No.

Q. Do you assign them on the basis of their political parties?

A. No, sir.

Q. Do you assign them on the basis of their economic income?

A. No, sir.

Q. Solely on the basis of race.

A. That is correct. Yes.

Q. And as far as you know, the schools of your parish, East Baton Rouge Parish, are operated consistent with the laws of the State of Louisiana.

A. That is correct.

. . . .

Q. . . . . Doctor, if a Negro parent, or parents, came to you and asked you to assign their children on to the public schools in the East Baton Rouge Parish School district on any other basis than their color, would you make such an assignment?

A. Not under the policies of the Board?

It being undisputed that the defendant board was operating its schools on a racially segregated basis and was requiring all students of each race to attend schools separately maintained for that race the plaintiffs were entitled to have a declaratory judgment declaring such practice to be illegal and an injunction that such practice be terminated.

The appellants criticize the District Court for not abstaining from actions under the rule most recently answered by the Supreme Court in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, and *Harrison v. National Association for the Advancement of Colored People*, 360 U.S. 167. The obvious answer to this contention is that we do not here construe the Louisiana Pupil Placement Law. We hold merely that whatever assignments may be made by the parish school board whether under a state pupil placement law, if held valid, or under any other policy of transfer or admission, the race or color of the pupil can not be a factor entering into such assignment. We have already dealt with such contention in the order denying motion for rehearing in the third appearance of *Orleans Parish School Board v. Bush*, 268 F. 2d 78, where on page 80 we said, "It is only when the Federal court is called on to interpret such state statute or rule on its constitutionality that the rule (of abstention) applies." Also, we said there, "No conceivable construction of the state statute can affect this result in the slightest degree." No ground for abstention exists here.

We find no merit in the contention that the trial

court erred in not requiring the National Association for Advancement of Colored People to become a party to the suit. It was in no sense an indispensable party.

The contention that the trial court erred in not invoking a three judge district court is without substance under the holding of the Bush case that there is no substantial constitutional question presented by the complaint. Moreover, no state statute was ruled on by the trial court.

The judgment is AFFIRMED.

A TRUE COPY

Test: EDWARD W. WADSWORTH

Clerk, U.S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

New Orleans, Louisiana

June 30, 1961

JUDGMENT

Extract from the Minutes of January 18, 1961.

EAST BATON ROUGE PARISH SCHOOL BOARD AND LLOYD FUNCHESS, SUPERINTENDENT OF SAID SCHOOL BOARD,

versus

CLIFFORD EUGENE DAVIS, JR., A MINOR BY HIS FATHER AND NEXT FRIEND, CLIFFORD EUGENE DAVIS, SR., ET AL.

No. 18524.

ROBERT O. McCRAINE, JR., ET AL,

versus

CLIFFORD EUGENE DAVIS, JR., A MINOR BY HIS FATHER AND NEXT FRIEND, CLIFFORD EUGENE DAVIS, SR., ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, East Baton Rouge Parish School Board and Lloyd Funchess, Superintendent of Said School Board, and the surety on their cost bond on appeal, Standard Accident Insurance Company; and Robert O.

McCraine, Jr., and others, and the surety on their cost bond on appeal, Home Indemnity Company of New York, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 18,524

EAST BATON ROUGE PARISH SCHOOL BOARD AND LLOYD FUNCHESS, SUPERINTENDENT OF SAID SCHOOL BOARD,

Appellant,

versus

CLIFFORD EUGENE DAVIS, JR., A MINOR BY HIS FATHER AND NEXT FRIEND, CLIFFORD EUGENE DAVIS, SR., ET AL,

Appellees.

ROBERT O. McCRAINE, JR., ET AL,

Appellants,

versus

CLIFFORD EUGENE DAVIS, JR., A MINOR BY HIS FATHER AND NEXT FRIEND, CLIFFORD EUGENE DAVIS, SR., ET AL,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

(April 13, 1961)

ON PETITIONS FOR REHEARING

Before TUTTLE, Chief Judge, JONES, Circuit Judge and MIZE, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered case be, and the same is, hereby DENIED.

FILED

13TH DAY OF April 1961

CLARA R. JAMES

Dy. Clerk of the United States Court of Appeals